MOTION FILED

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No. 07-990

In the

Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ALASKA MINERS ASSOCIATION, NORTHWEST MINING ASSOCIATION, IDAHO MINING ASSOCIATION, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA FOREST ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF), on behalf of PLF and the additional amici curiae listed below, respectfully moves this Court for permission to file the attached brief amicus curiae in support of Petitioner State of Alaska.[2] PLF timely sent letters indicating its intent to file an amicus brief to all counsel of record indicated on this Court's docket as of February 6, 2008. Written consent for amicus participation was granted by all counsel of record contacted at that time. After receiving consent of counsel, PLF noted that counsel for Goldbelt, Inc., Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation had not been listed as counsel of record on the docket. PLF immediately contacted these counsel and sent a letter indicating its intent to file an amicus brief and seeking written consent. Counsel for Goldbelt, Inc. provided consent of counsel. However, because notice was within 10 days before the due date of the brief, counsel for Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation have withheld consent.

Founded 35 years ago, PLF is the largest and most experienced public interest legal foundation of its kind. PLF is a nonprofit, tax-exempt corporation organized

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] Coeur Alaska, Inc., has separately filed a petition for certiorari in No. 07-984, from the same decision below. Amici believe that Coeur Alaska's petition has equal merit, but see no need to file an additional brief.

under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF participated as lead counsel in previous cases involving the administration of the Clean Water Act. *See Rapanos v. United States*, 547 U.S. 715 (2006). And PLF also participated as amicus or lead counsel in several cases concerning the Takings Clause of the Constitution. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

The Alaska Miners Association (AMA) is a non-profit membership organization established in 1939 to represent the mining industry. The AMA is composed of more than 1,100 individual prospectors, geologists and engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. The AMA's members explore for and produce gold, silver, platinum, diamonds, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other mineral resources. AMA members live and work throughout the state and if the decision of the Ninth Circuit Court of Appeals in *Southeast Alaska Conservation Council v. Corps* is allowed to stand it will have extreme adverse impacts on the members and their ability to operate.

The Northwest Mining Association (NWMA) is a 114 year-old, 1,800 member nonprofit, nonpartisan trade based association located in Spokane, Washington. NWMA's members reside in 35 states and are actively involved in permitting, exploration and mining projects on federal, state, and private lands

throughout the Western United States. NWMA's membership represents every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, legal services, and sale of equipment and supplies. The NWMA's members have significant experience with the Clean Water Act and the permitting issues raised in the instant case. NWMA members work in every state within the Ninth Circuit and are adversely impacted by this decision.

The Idaho Mining Association (IMA) is a nonprofit organization established in 1903 to represent Idaho's mining industry. IMA membership includes companies that mine minerals in Idaho as well as exploration companies and companies that provide products and services to the mining industry, and likewise will be adversely impacted by the Ninth Circuit decision if it is allowed to stand.

The Resource Development Council for Alaska, Inc. (RDC), is a statewide, nonprofit, membership funded organization that was established in 1975. The RDC is comprised of businesses and individuals from Alaska's mining, oil and gas, forest products, fisheries, and tourism industries. RDC's membership also includes Alaska Native corporations, organized labor, industry support firms, and local governments. Within the mining industry, RDC's members include individual prospectors, geologists, engineers, junior mining companies, and major mining companies. The RDC works to promote and support a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of Alaska's natural resources. Members

of the RDC will be adversely impacted if the Ninth Circuit decision stands.

The Alaska Forest Association (AFA) is a nonprofit industry trade association established in 1957. The AFA's membership includes businesses and individuals in the Alaskan timber industry. The AFA's mission is to advance the restoration, promotion, and maintenance of a healthy, viable forest products industry that contributes to the economic and ecological health of Alaska's forests and communities. AFA members will also be harmed if the Ninth Circuit decision stands.

PLF believes that its litigation experience will provide an additional, valuable viewpoint on the issues presented in this case. Specifically, PLF seeks to augment the arguments of the Petitioners by clarifying just how much the Ninth Circuit's decision will impact the economy of Alaska and the mining and natural resource industries of Alaska and the Western United States.

For the foregoing reasons, Amici Pacific Legal Foundation, Alaska Miners Association, Northwest Mining Association, Idaho Mining Association, Resource Development Council for Alaska, Incorporated, and Alaska Forest Association

respectfully request that this Court GRANT their motion for leave to file the attached brief.

DATED: February, 2008.

Respectfully submitted,

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QUESTION PRESENTED

1. Whether the Ninth Circuit erred in invalidating the longstanding regulatory interpretation of the U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA") that discharges of dredged or fill material are subject to the exclusive permitting authority of the Corps under Section 404 of the Clean Water Act, rather than effluent limitations and standards of performance promulgated under Sections 301 and 306 and applied by EPA pursuant to its separate permitting authority under Section 402.

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SUMMARY OF ARGUMENT[1]

The Ninth Circuit's decision invalidated the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency's (EPA) interpretation of the Clean Water Act (CWA) that the discharge of fill material into an impoundment falls within the Corps' exclusive permitting authority

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Pursuant to Rule 37.2(a), Amici Curiae state that PLF timely sent letters indicating its intent to file an amicus brief to all counsel of record indicated on this Court's docket as of February 6, 2008. Written consent for amicus participation was granted by all counsel of record contacted at that time. After receiving consent of counsel, PLF noted that counsel for Goldbelt, Inc., Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation had not been listed as counsel of record on the docket. PLF immediately contacted these counsel and sent a letter indicating its intent to file an amicus brief and seeking written consent. Counsel for Goldbelt, Inc. provided consent of counsel. However, because notice was within 10 days before the due date of the brief, counsel for Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation have withheld consent. The consent of all parties of record are filed herewith, with the exception of counsel for Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation.

under Section 404. In place of this long-standing interpretation, the Ninth Circuit erroneously held the CWA to require that the discharge of fill materials also must satisfy effluent limitations and performance standards that are separately promulgated by the EPA and that apply to discharges of pollutants that are subject to Section 402 of the Act. In so holding, the Ninth Circuit created an unintended and impracticable regulatory barrier, not intended by Congress, to one of the most common and environmentally sound methods for the disposal of mining waste. This Court's decision not only will settle the proper permitting authority for the discharge of fill material, but as a practical matter also will determine whether productive mining will be permitted to reasonably operate in Alaska and in the rest of the nation.

Amici Curiae agree with the legal arguments as set forth by Petitioners the State of Alaska and Coeur Alaska and by Amicus Curiae National Mining Association. Amici also agree and emphasize at the outset that the Ninth Circuit's decision is not a parochial matter bound to the facts of one mining project. To the contrary, if left unreviewed, the Ninth Circuit's decision may have a dramatic impact on the mining industry at large and Alaska's economy, and additional industries and activities.[2]

This case is of vital importance to Alaska's mining industry (as well as to mining in the rest of the

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[2] Indeed, a similar challenge to a Corps determination regarding impoundment of coal mine waste currently is pending review in the Fourth Circuit Court of Appeals. *Ohio Valley Environmental Coalition v. United States Army Corps of Engineers*, No. 07-1355. In this case, plaintiffs challenged the Corps' determination that sediment ponds did not require Section 404 or 402 permits.

Western United States). Historically, mining has been a cornerstone of the Alaskan economy, and today the industry is delivering a broad range of economic benefits to Alaskans and their local communities. Mining is a significant source of revenue and infrastructure development for state and local governments and Native corporations. The livelihoods of many Alaskans and their families depend on mining. Amici urge the Court to accept review of the Ninth Circuit's decision and to confirm the settled principle that Section 404 governs permitting for placement of tailings as fill material.

ARGUMENT

A. Subjecting Fill Material to the EPA's Effluent Limitations Demonstrates the Impact of Ill-Fitting Regulation on the Mining Industry

The CWA, 33 U.S.C. §§ 1251-1387, establishes two regulatory permitting programs for discharges into navigable waters of the United States. Section 404 of the Act requires a permit for the discharge of dredged or fill material into navigable waters and is administered by the Corps, with cooperation and regulatory assistance from the EPA. 33 U.S.C. § 1344. Section 402, also called the National Pollutant Discharge Elimination System (NPDES) program, is administered by the EPA and requires a permit for discharge of all pollutants other than dredged or fill material. 33 U.S.C. § 1342. Under Section 402, the discharge of pollutants is subject to the effluent limitations and performance standards (collectively effluent limitations) prescribed pursuant to Sections 301 and 306 of the Act. 33 U.S.C. § 1311 (Section 301

effluent limitations), 33 U.S.C. § 1316 (Section 306 new source performance standards).

Tailings impoundment is one of the most common and often the only safe method of solids disposal from mining operations. *See* Alaska Minerals Commission, *Report of the Alaska Minerals Commission 2004,* at 9.[3] Historically, the discharge of mine tailings into an impoundment had been regulated by the Corps under the "fill material" provisions of Section 404. "The discharge of wastewater containing tailings from Coeur Alaska's froth-flotation mill operation facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake." *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers (SEACC),* 486 F.3d 638, 644 (9th Cir. 2007) (citing 33 C.F.R. § 323.2(e)). Under the approach historically taken by the Corps and EPA, Section 402 would therefore come into play only if there was a subsequent discharge of liquid from the tailings impoundment into nonimpounded waters. However, in *SEACC*, the Ninth Circuit determined that because tailings slurry was a discharge from a froth-flotation mill, it must also be subject to the EPA's effluent limitations as "process water" from mining activities, rather than "fill material." *SEACC*, 486 F.3d at 644; 40 C.F.R. § 440.104(b)(1) ("[T]here shall be no discharge of

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[3] *Available at* www.commerce.state.ak.us/oed/minerals/pub/web04.pdf (last visited Feb. 14, 2008).

As the National Mining Association explained in its amicus brief before the Ninth Circuit, placement of tailings in waters is a common and environmentally preferred practice, even where dry stacking is available as an option because it avoids the potential for air-borne, runoff, and leachate contamination. Nat'l Mining Ass'n Ninth Circuit Amicus Br. on the Merits at 8.

process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores.").

The Ninth Circuit observed that "[b]oth of the regulations appear to apply in this case, yet they are at odds." *SEACC*, 486 F.3d at 644. They are at odds, however, only if divorced from the text and structure of the CWA. *See* Coeur Alaska Pet. 2-4, 21-27. Under Section 404, mining operations may be permitted to discharge tailings into an impoundment. In contrast, under Section 402, which applies only to discharges of effluent other than fill material, 13 U.S.C. § 1342(a), the applicable effluent limitations for discharge from froth-flotation mills sets the threshold for allowable particulate matter suspended in water by measuring milligrams per liter. *See, e.g.*, 40 C.F.R. § 440.104. As the Court recognized, if applicable, these effluent limitations were intended to be "absolute prohibitions," with no exceptions. *SEACC*, 486 F.3d at 645 (quoting *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977)).

Contrary to the conflict claimed by the Ninth Circuit, the Corps and EPA have consistently interpreted the CWA for over 25 years to give the Corps Section 404 permitting authority over the discharge of tailings and other waste rock fill into an impoundment. *See, e.g., Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 431 (4th Cir. 2003). However, by subjecting the discharge of slurry from the froth-flotation mill into an impoundment—regardless of whether or not the discharge would be subsequently released from

the impoundment into downstream waters or wetlands—the Ninth Circuit has subjected one of the most common methods for mining waste rock disposal under Section 404 to the "absolute prohibitions" contained in the effluent limitations that govern discharges subject to Section 402.

The Kensington mine project provides a stark example of how the Ninth Circuit's erroneous and inflexible interpretation of the CWA will dictate counterintuitive results. The invalidated 404 permit for the Kensington mine represented the collective expertise of scientists, engineers, and state and federal permitting agencies in determining that management of tailings in Lower Slate Lake would pose the least environmental impact. If the Ninth Circuit's decision is upheld, the Kensington mine project will be precluded from using a small lake impoundment in a valley for the placement of tailings, and will instead be forced to pursue an alternative method of disposal that would result in greater loss of wetlands. *See* Coeur Alaska Petition for a Writ of Certiorari at 6-7 (citing the Court of Appeals' Joint Supplemental Excerpts of Record (C.A. JSER) at 401-02 (the drystacking alternative would have required the conversion of more than 100 acres of wetlands); C.A. JSER at 872 (impoundment would minimize the environmental impact over drystacking alternative)). For other potential mine projects in Alaska and the western United States, the Ninth Circuit's interpretation of the CWA could potentially prohibit the use of even the smallest body of water or wetlands for tailings disposal—even when such tailings disposal would minimize the environmental footprint beyond other alternatives such as drystacking because it avoids the potential for air-borne, runoff, and leachate

contamination. This interpretation of the CWA raises an issue of fundamental importance to both Alaska and the nation which warrants review by this Court.

B. The Viability of the Mining Industry Is an Acute Issue to Alaska and the Western United States

The importance of the mining industry to Alaska cannot be overstated. Historically, mining has been a cornerstone of Alaska's economy, and the mining industry continues to be one of the most important growth segments of Alaska's economy (currently the only segment of Alaska's economy that has reported double-digit growth). The mining industry accounts for approximately 8% of Alaska's overall economy. *See* State of Alaska Petition for a Writ of Certiorari at 29-30 (citing U.S. Dep't of Labor, Bureau of Labor Statistics, *Alaska Economy at a Glance* (2007); U.S. Dep't of Commerce, Bureau of Economic Analysis, *Gross Domestic Product by State* (2007); D. J. Szumigala & R. A. Hughes, *Alaska's Mineral Industry 2006: A Summary* 1-2 (2007)). According to the most recent study conducted for the AMA, the mining industry contributed $4 billion to Alaska's economy in 2007, including $275 million in exploration, $274 million in development, and $3.4 billion in gross mineral production value. Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry* (2008).[4] The mining industry is also an extremely important source of revenue for state and local governments. In 2007, the mining industry paid $14 million to local government, and $175 million to state government. *Id.*; *see also* McDowell Group, Alaska

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[4] *Available at* www.alaskaminers.org/mcd07sum.pdf (last visited Feb. 14, 2008).

Miners Association, *The Economic Impact of Alaska's Mining Industry* (2006).[5] The Alaskan mining industry also provides a major source of revenue for Native Alaskan corporations. In 2007, the mining industry paid $170 million to Native corporations, of which $125 million was earmarked for redistribution among other Alaska Native regional and village corporations. Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry* (2007).

In 2007, the mining industry provided 5,500 direct and indirect mining jobs in Alaska, contributing $340 million in direct and indirect payroll. *Id.* These jobs represent some of the highest paying wages in Alaska, with an average annual wage of $80,000—90% higher than the state average for all sectors of the economy. *Id.* And, where located, mining operations provide some of the largest private sector employment opportunities. *Id.*

A 2006 study of the mining industry reported that the industry was poised for ongoing growth; however, the Ninth Circuit's decision could have a devastating impact on the mining industry and economy of Alaska —not to mention impacts felt throughout the nation. McDowell Group, *The Economic Impacts of Alaska's Mining Industry*, *supra*, at 1. It is beyond reasonable dispute that mining operations in Alaska will come into contact with wetlands, which comprise almost 50% of the state. *See* Alaska Minerals Commission, *Report*

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[5] *Available at* www.alaskaminers.org/mcd06rpt.pdf (last visited Feb. 14, 2008).

of the Alaska Minerals Commission 2006, at 1.[6] As the Alaska Minerals Commission explained:

> The permitting of the disposal of mine tailings into waters of the United States including wetlands is critical to the mining industry in Alaska. Many mine operations can only be built in valley areas through which streams run and wetlands are present. In many instances disposing of tailings in a "drystack" on uplands is not practicable.

Id. at 13. And even before the Ninth Circuit's decision, obtaining a permit for the disposal of tailings was considered one of the "greatest obstacles" to developing a mine project in Alaska. Alaska Minerals Commission, *Report of the Alaska Minerals Commission 2008*, at 2.[7] The Ninth Circuit's decision makes this process even more difficult (if not impossible) by leaving no practicable solution which would permit the discharge of slurry into an impoundment.[8]

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[6] *Available at* www.commerce.state.ak.us/oed/minerals/pub/web06.pdf (last visited Feb. 14, 2008).

[7] *Available at* www.commerce.state.ak.us/oed/minerals/pub/mineralsreport2008_web.pdf (last visited Feb. 14, 2008).

[8] One of the most significant distinctions between the permitting programs under Sections 404 and 402 is that the Section 404(b)(1) guidelines contain "practicability" provisions. Under these Section 404 provisions, the Corps has the latitude and flexibility to evaluate and issue Section 404 wetlands permits in a manner that is based on cost, technological feasibility, sound science, and the minimization of environmental impact. By contrast, the EPA's Section 402 "zero discharge" performance standard is essentially

(continued...)

While mine exploration and development expenditures have steadily increased over the past decade, an uncertain and unsettled regulatory environment could have the effect of jeopardizing Alaska's ability to attract investment and growth of the mining industry. Alaska Minerals Commission, *Report of the Alaska Minerals Commission 2008*, *supra*, at 1. In addition, if the Ninth Circuit's decision is left unreviewed, producing mines that use tailings impoundments will have to cease or delay their operations until they can be brought into compliance with the new regulatory scheme. *See* 33 U.S.C. §§ 1319, 1365. For example, Alaska's Red Dog mine is operating under a Section 404 permit that was issued in 1985 for the placement of lead and zinc tailings into an impoundment located in wetlands. Nat'l Mining Ass'n Ninth Circuit Amicus Br. in Support of Motion for Rehearing en Banc at 10 (citing SER 836, 978-79).[9] If left unreviewed, the Ninth Circuit's decision could be used to frustrate this essential mining operation. The impact would be devastating as the Red Dog mine is the single most productive mine in Alaska, earning $1.6 billion in 2007, providing $9 million (of the total $14 million) in payment to local governments, and nearly all of the $170 million in revenue to Native Alaska corporations. *See* Marketwire, *Teck Cominco*

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[8] (...continued)
absolute, with only a few very limited "net precipitation" and similar exceptions.

[9] Similarly, the Fort Knox gold mine is operating under a Section 404 permit to discharge tailings into an impoundment located in a wetland. *Id.* at 11.

Reports Fourth Quarter Results for 2007;[10] McDowell Group, *The Economic Impacts of Alaska's Mining Industry, supra.* The potential impact to Alaska's mining industry and its demonstrated ability to bring economic development to diverse, remote areas of Alaska warrants review by this Court.

C. The Ninth Circuit's Decision Could Disrupt Other Natural Resources Industries

In addition to impacting mining interests, the Ninth Circuit's decision has the potential for broader impacts on other natural resource industries in Alaska and the western United States. For example, the forest industry also engages in practices that are subject to permitting under Sections 404 and 402 of the CWA, including the operation of sawmills and log transfer facilities. Alaska's "unique and rugged terrain" requires that the forest industry use wetlands and other bodies of water to store logs for processing or transport to the market, and other operations involving dredge and fill. *See, e.g., City of Angoon v. Hodel*, 803 F.2d 1016, 1019-21 (9th Cir. 1986). Under the Ninth Circuit's decision, forest industry practices like this, which rely on the ability to use wetlands, may be limited or altogether prohibited. The potential for the Ninth Circuit's decision to impact other segments of Alaska's natural resources industries warrants review.

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[10] *Available at* www.marketwire.com/mw/release.do?id=819853 (last visited Feb. 14, 2008).

CONCLUSION

For the foregoing reasons, Amici Curiae urge this Court to grant the Petition for a Writ of Certiorari.

DATED: February, 2008.

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